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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 415

MEYER ABRAMS, HARRY J. MYERSON AND FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,

Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

On Petition for Writ of Certiorari.

PETITIONERS' REPLY.

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The Question: Respondent says (p. 1) that the "single" issue before the Master and the District Court was "how much compensation should be allowed petitioners", which was "a question of fact", and that the issue in the Circuit Court of Appeals and before this Court is "Should the Court disturb the concurrent findings made below?" This is an *incorrect statement* as to the issues presented before the District Court, the Circuit Court of Appeals and before this Court. It is

true that the question before the Special Master was, as they state, "how much compensation should be allowed to the petitioners", but the question before the District Court was *different*. The Master recommended compensation for services rendered, under subdivision (b) of the petition (R. I. p. 4) and recommended the denial of *any compensation* for the services under subdivision (a). The *first* was a *factual* question, while the latter was purely a *legal* question. The question "how much compensation" should be allowed is a *factual* question, while the question whether *any* compensation should be allowed is purely a *legal* question (*Re American Air Lines,* 115 F. (2d) 196).

The question before the Circuit Court of Appeals *did not involve any factual questions* because the appeal was not taken from the allowance made by the Court under subdivision (b), but from the complete *denial* of *any* compensation under subdivision (a), and the appeal was allowed only from that *portion* of the decree (R. 1-2). While petitioners were dissatisfied with their allowance, yet they only appealed on *legal* questions insofar as they related to the total disallowance of *any* compensation for the services rendered in the field of administration, in opposition to the Plans, and the approval of the Final Plan. Neither the Circuit Court of Appeals nor this Court was presented with the question whether "the concurrent findings made below" should be disturbed for the obvious reason that *there were no "concurrent findings"* by the Court and the special Master, as *the Judge did not allow to the objectors the opportunity to have a "hearing"* and did not examine the evidence. We pointed out in the petition that a decision under such circumstances by a Judge *does not constitute a "concurrent finding" or decision.*

The question before the Circuit Court of Appeals, as well as before this Court is, whether the objectors who

complied with the order of the Court in filing their objections and who demanded a hearing which was denied, are entitled to their day in court, and whether the disposition of their objections without notice and hearing, in violation of Rule 53, constituted due process of law. This is primarily the question which is presented here on the petition for the Writ of Certiorari.

The Comment: Under the heading "Comments on Statement of Facts", Special Counsel appointed by the Special Master (R. I, p. 310) say on behalf of the respondent that according to petitioners "they have been the victims of a malignant combination" of a "biased" special Master, and of a District Judge who "did not examine the evidence" and of a Circuit Court of Appeals which ignored its "duty". *We never charged that there was a combination* between the special Master, the District Judge and the Circuit Court of Appeals. The charge against the special Master was that *he was biased.* The District Court did not afford an opportunity to the petitioners to offer evidence to sustain their charge, nor did it give them the opportunity to be "heard" under its *mistaken conception* that it had a right to pass upon the objections "without notice" and without a "hearing". The error in this respect was the basis for the complaint against the District Judge. We did not charge him with *any* bias. The complaint in the Circuit Court of Appeals is that it was mistaken in its construction of Rule 53 (e) 2, and because of its erroneous conclusion as to the effect of the rule, it erred in its judgment. In view of this record the "comments" are *unwarranted.*

The Recommendations: The assertion (p. 5) that the recommendation of the Master is "simply a lump sum" for "all" of the services of the "petitioners" is made for the purpose of justifying the

contention that there is only a *factual* question and *not* a *legal* question, and to justify the decision below which held that there were no legal questions involved. The falsity of the assertion appears from the findings of the Master. In his discussion under subdivision "1" relating to petitioners' services concerning administrative matters wherein they claim that their services benefited the estate, the Master concluded that the statement was "untrue" (R. 180), and that "petitioners have contributed *nothing*". Can it be said in good faith that this "*nothing*" was included in the "*lump sum*" and was included in "*all*" of the services rendered? The only irresistible conclusion is that compensation for *these services were totally denied.* This presents a *purely legal question,* as shown above.

Under subdivision "2", which was discussed by the Master (R. I, p. 181), he ended his finding with the conclusion that petitioners "*did not contribute anything*" and that their services did not contribute to the results (R. I, pp. 182, 183). The discussion under subdivision "3" (R. I, p. 183), ended with the words that petitioners "are entitled to *no compensation therefor*" (R. I, p. 186). The discussion of Item "4" (R. 186), also ended with the words that the petitioners were entitled "*to no compensation*" (R. I, p. 187), and such was his conclusion as to Item "6" (R. 188).

It is evident from the foregoing that *none* of these items were included in the alleged "lump sum", and were *totally denied.* It was therefore a *purely legal question* presented wholly distinct from the allowance which was not involved in the appeal, and is not involved here on the application for the Writ, and no review was ever sought from the allowance.

The Commission's Comments: On the one hand respondent relies on the comments of the Securities and Exchange Commission when it suits its purposes (p. 6), and on the other hand it ignored its comments when it recommended the allowance of $5,339.51 for the expenses (R. II, p. 102), whose recommendation was *ignored* by the Master and the Court and petitioners were only allowed $2,500 for such expenses. While the recommendations of the Securities and Exchange Commission were entitled to some consideration, yet this Commission did not participate at the hearings when petitioners performed their services, and its appearance was filed thereafter. It could only have gained its knowledge from the review of the record, which review is equally available to this Court, and neither the Special Master nor the Court paid much attention to its recommendations as to the various allowances.

The Commission recommended $13,500 to another claimant (R. II, p. 82) and the Master recommended $25,000 or 100% of the claim (R. II, p. 16). The Commission recommended the payment of $42,000 for another claim (R. II, p. 84), and the Master recommended $49,000, or 100% of the claim (R. II, p. 24). The Commission recommended to another applicant $12,500 (R. II, p. 84), and the Master recommended $17,500 (R. II, p. 45). The Commission recommended $12,500 to counsel for the Michigan Committee (R. II, p. 98), and the Master recommended $15,000 (R. II, p. 56). It recommended the allowance of $20,000 to counsel for the New York Committee (R. II, p. 98), and the Master recommended $22,500 (R. II, p. 47). It is evident therefore that the Master *did not follow the recommendations of the Commission.*

The Decision of the Judge: Respondent concedes (p. 7) that when the Master filed his report on May 16, 1942, he informed all parties that the matter will come on for hearing on June 13, 1942; that on June 1, 1942, the "**Judge**" changed the arrangements and "*postponed the hearing*" to "*a time to be hereinafter fixed by the court and noticed by the Clerk to the interested parties*". It further *concedes* that petitioners filed their Objections and Brief on June 5, 1942, and "*requested an oral hearing*" and such *request was not granted.* The matter was not "noticed" for "hearing" and no time was ever "fixed" for any hearing. It urges (p. 4) that "full opportunity" was given for the filing of briefs. Petitioners are not complaining that no opportunity was afforded them to file a brief. They requested *oral argument on the face of the objections* (R. I, p. 192), and concluded the Brief (R. I, p. 204) with the words "**Oral Hearing Is Requested**". In the face of such requests and the denial, without any *opportunity for a hearing,* the statement of Respondent as to the alleged *opportunity* is *unwarranted.*

The contention that "no *proffer* of evidence was made" and that after a "long interval appeared to indicate that all arguments had been made in writing", the court announced its decision on August 21, 1942, *is obviously not in accordance with the record.* Their statement that it *was indicated that all arguments had been made in writing* is *refuted by* the *written demand* in the objections (R. I, p. 192) which was repeated in the brief (R. I, p. 204).

The Argument: Respondent contends: (a) that the Judge examined the evidence; (b) that the allowance was adequate, and (c) that no hearing

was necessary, although requested by the objectors. We will show that there is no merit in any of the contentions.

A. The Judge Did Not Examine the Evidence.

In their attempt to convince this Court that the judge examined the evidence Respondent says (p. 11) that his opinion *affirmatively* shows "he examined the applications, the Master's Report, the exceptions, the reasonableness of the Master's allowances, the benefits to the estate and the contributions to the confirmation of the plan." The word *"evidence" does not appear in the quotation.*

Petitioners never contended that the court did not have the right to adopt the findings of the Master without making findings of its own and the citation of Rule 52 (a) was therefore unnecessary. *Our contention is that without reading the evidence a court may not make its own findings nor may it adopt the Master's findings.* Anyone reading the opinion of the District Court (R. I, p. 205) with an *unbiased mind* must come to the *irresistible conclusion* that the judge did *not* examine the evidence.

The contention (p. 12) that the journal entry containing the words "upon the evidence" controls, is without merit as it does not state that the court read or examined the evidence. The "entry" was prepared by Special Counsel based on the opinion of the judge, and the statement of the judge as to what he examined is controlling and not the journal entry.

B. The Adequacy of the Allowance Is Not in Issue.

The adequacy of the allowance was not at issue in the Circuit Court of Appeals, nor is it at issue on the appli-

cation for the writ of certiorari, as the appeal was only taken from that portion of the order which denied *any* compensation for the services in subdivision (a), and anything that is said in Respondent's answer on the adequacy of the compensation should be disregarded.

(a) "Rules of Law Applicable."

Rule 53 (e) 2 and Bankruptcy Order 47 are said to be (p. 13) controlling. Respondent only picked out of the rule the words "unless clearly erroneous" and lost sight of the remainder of the rule calling for "notice" and "hearing". Their discussion begins and ends with the words "unless clearly erroneous", which is constantly repeated and stressed. Respondent's *conception* of this rule *is "clearly erroneous"*, as the rule is *inapplicable* to findings which are based on deductions and inferences from documents and on evidence which is not in dispute. (*Kycoga Land Co.* v. *Kentucky River Canal Co.*, 110 F. (2d) 894, 896.) It is inapplicable to a case where the court *did not examine the evidence and did not accord the Objectors their "hearing"* which they were entitled to under that rule. It is inapplicable to the conclusion of the Master in discussing Item "6" and which is barren of all facts and where it was the duty of the District Court to make its own findings, as discussed in the petition (p. 38). The construction of this rule that Masters and Referees *may not substitute conclusions for findings and that this is in violation of the Rule,* was held in two decisions by the District Court of New York, which are not yet published and appear in C. C. H. Bankruptcy Law Reports, at ¶s. 54,484 and 44,490 (*Re George R. Buraw, Inc.* (S. D. N. Y.), rendered July 12, 1943, and *In re Ames Furniture Co., Inc.*, E. D. N. Y., rendered June 2, 1943).

We have no quarrel with the authorities which they cite (pp. 13-14) on the point that due regard must be given to the opportunity of the Judge to familiarize himself with the proceedings, and that the decision of a judge who did familiarize himself is entitled to weight. However, this judge *did not familiarize himself with the proceedings.* None of the proceedings took place in his court room, as he had *abdicated his functions to the special Master.* Most of the reports of the Master were not filed in court until several years thereafter, and *many orders which were to be entered by the court were entered by the Special Master* (R. I, 71, 100, 102, 218, 222, 231, 248, 243 and 310).

Whether or not volunteers are entitled to compensation *was not in issue below,* and the case was not decided on such an issue. Respondents have no right to urge a denial of the petition on issues which were never presented below.

We have no quarrel with the proposition (p. 15) that allowance of compensation is discretionary. The discretion, however, is *not arbitrary* and may only be exercised when the opportunity was afforded upon due "notice" and "hearing", pursuant to Rule 53 (e) 2.

1. **"Independent Supervision"**: The question whether petitioners' services resulted in the independent supervision as discussed in the petition (pp. 21-33), was fully argued there and need not be repeated. Respondent relies on various documentary proofs (p. 17) the inferences of which are open for review, and Rule 52 (a) has no application to such inferences and deductions.

2. "Salaries": Petitioners stated that they were not claiming any compensation under this item and therefore no reply is necessary as to this point.

3. "Segregation of Tower Funds": Respondent again relies on inferences and deductions from the undisputed evidence in support of its contention that the finding of the Master that the petitioners did not contribute anything is controlled by Rule 52 (a), and we have already shown that the rule is not applicable.

4. "Chamber of Commerce Lease": In an effort to minimize the services rendered which brought about the extinguishment of the costly lease to the Chamber of Commerce, whereby it lost from $12,000 to $25,000 per year annually, respondent says (p. 19) that the lease was neither rejected nor canceled, but expired by lapse of time. This allowance of the lease to expire by lapse of time and not to renew the option brought a loss to the estate of over $100,000 during the pendency of the 77B proceedings. The expiration of the lease was no obstacle for the Special Master to recommend the allowance of $15,000 to another attorney whose major contribution was with reference to the lease (R. I, p. 178). In enumerating the documents tending to support the Master's finding, respondent omitted reference to the documents which tend to *refute* his Report, as shown in the petition (pp. 34-35).

5. "Rejection of 1937 and 1938 Plans": Respondent says (p. 31) that petitioners misquoted in one instance the term applied by the Master to the statements as "untrue", while the

Master said that it was not a statement of the "whole truth". Sometimes a statement that one is not telling the "whole truth" is worse than a statement that one did not tell the truth. In either event a reading of the Master's report dealing with the rejection of the unfair plans cannot lead to a conclusion that the Master recommended *any reward* to petitioners for their services in this respect. The Master intended by his report to belittle any claim for services rendered in rejecting the 1937 plan (R. I, p. 168), saying "shortly after submission of the plan to the creditors it became apparent that acceptance thereof by the creditors was out of the question." He repeated the same thing in another report (R. I, p. 281) and in his report on fees he emphasized that the opposition was made by the two Committees who represented large blocks of bonds (R. I, p. 188). Such statements were not made in the interest of recommending to the court compensation to the petitioners. He would have at least mentioned that the Michigan Committee *was organized as a result of petitioners' objections to the plan and that it interposed objections* because of the information and conferences had with petitioners (R. I, p. 166), as we have shown in the petition (p. 36). He would have pointed out that this plan was sponsored by the Debtor, the Subsidiary, and their "executive officers" as well as the "general counsel" who solicited consents at an expense to the estate, which he *authorized* and that counsel for the Adams Group also sponsored the plan, all of which was omitted from his report. *One cannot read that part of the report with an unbiased mind and conclude that it intended to recommend a reward to petitioners for such services.* The statement (p. 21) that petitioners did not object to the 1938 plan is contradicted by the verified petition (R. I, p. 12), which was not even disputed. Here again counsel applied the test of "clearly erroneous" which is inapplicable to inferences from such documents.

6. "Adoption of the 1940 Plan": In discussing the single sentence of the Master that "the record shows no contributions offered by petitioners to the plan of reorganization which was adopted," counsel did not attempt to justify the conclusion (which a Master may not make without setting forth the facts) which placed the burden on the court to go through the *entire* record to see if the conclusion is justified and which it failed to do and failed to make any findings as required under the rule as construed in the decisions above cited. Respondent *concedes* (p. 21) that petitioners joined with the other Committees in recommending the adoption of the 1940 plan. They forgot, however, to state that petitioners *opposed* the unfair plan of 1937 and did *not join in recommending the other unfair plan of* 1938 and *only* joined the other creditors in recommending the acceptance of the *fair* plan of 1940.

Respondents dispute our statement (p. 22) that the "proposed amendments" of petitioners found their way in the 1940 plan. Although they seem to *rely* on the comments of the Commission which at least *conceded* (R. II, p. 104) that the 1940 plan "bears some similarity" to the plan proposed and "advocated" by the petitioners, yet when it suits their convenience they *disregard it.* It may be true that in asking to appraise the value of the leasehold estate we did not use the figure $3,000,000. We did, however, point out (R. I, p. 95) that the release of the bond issue for the securities to be issued by the Tower Building Corporation was unfair *"in view of the fact that the value of the leasehold estate is much less than the debt due on the* bond issue." We did ask in the "proposed amendments" to the plan (R. I, p. 98) that *an appraisal be made of the leasehold estate* and did suggest

that 50% of the appraised value be given in bonds and 50% in other securities secured by the Tower Building and *for the* balance of the debt "to the extent of the difference between the valuation of the property and the amount of the debt," *the bondholders be treated as general creditors.* In the original amendment to the plan we also suggested (R. I, p. 275) *"that the leasehold bondholders should participate as general creditors to the extent of the difference between the appraised value of the property and the face amount, plus accrued interest."* This is *exactly what was accomplished by the* 1940 *plan.*

Respondent says (p. 22) that petitioners did not propose that the bond issue be reduced to $3,000,000. Their proposal was that the bond issue be reduced to 50% of the appraised valuation and 50% should be given in common stock. The *two classes of securities would have given the leasehold bondholders everything that was represented by the equity* and security of the Tower Building, and for the balance it was suggested that they be treated as *general creditors.* This is the same result which was arrived at by the 1940 plan when the Tower Building was appraised at $3,000,000 by which the bondholders were given bonds for substantially that amount. It may be true that here and there there was a comma or a period missing between our proposed plan and the plan as finally adopted; the general concept and the scope of the plan, however, were there.

Counsel *concede* (p. 22) that certain suggestions which petitioners made were included in the final plan but say that such suggestions were rather "obvious." No matter how *obvious* they were after petitioners directed attention to the "obvious" they were *absent* from the 1937 plan which was permitted to be submitted to the bond-

holders and to solicit consents thereto at the expense of the estate, which was also recommended by the Adams Group and which was *not opposed* by the Trustees of the Debtor, *the appointees of the court.*

The Master's statement that the record does not show any contribution towards the 1940 plan is, therefore, *refuted by their own admission.* Here again respondents resorted to the "clearly erroneous" *test* which is not applicable to deductions and inferences. It is "clearly erroneous" to apply this rule to a "conclusion" of a Master without setting forth the facts under discussion of point "6" (R. I, p. 188) and as urged in objections to his report (R. I, p. 198).

7. "Elimination of Claims": Counsel call attention to the fact that petitioners were evidently satisfied with the allowance made for contesting the Morgan claim, as they made no mention in their brief of any complaint. Whether or not they were satisfied is of no importance, as they decided not to appeal from the allowance and merely appealed from the disallowance (R. I, pp. 1-2). They call attention to the Master's finding that the contribution of the petitioners "was of negligible value" and say that if petitioners were successful they would have not only eliminated the interest but also the principal. This does not warrant the total denial of compensation for bringing about the elimination of a claim for interest in excess of $10,000,000. That this resulted from petitioners' efforts was fully discussed in the petition (pp. 40-46).

8. "The Expenses": Respondent urges that the precedent of the Circuit Court of Appeals when it only allowed 20% for reimbursement of

costs in the Morgan Appeal is determined on the allowance of reimbursement of costs in the reorganization proceedings. This point was fully discussed in the petition (pp. 46-47) and no reply is deemed necessary. It should be noted, however, that the respondent relies on the recommendation of the Commission as to fees and found it necessary to reprint the comments of the Commission in their appendix to the brief (pp. 28-32), although such comments appear in their supplemental record (R. II, pp. 102-105), ignored the fact that the Commission only recommended a reduction of $300 from the expenses (p. 31) and recommended (R. II, p. 102) the allowance of $5339.51 instead of $2500, and also filed a brief in the Circuit Court of Appeals, *urging this allowance.* However, the court only allowed $2500 and if the recommendation of the Commission is entitled to any weight, it is certainly entitled to be considered on the question of expenses.

C. A Hearing Was Not Only Necessary But Mandatory, Under Rule 53 (e) 2.

Under the heading "No Hearing Was Necessary Where No Evidence Was Offered" respondent repeats (p. 39) the contention that Rule 53(e) 2 does not require an "oral hearing" but requires only a "hearing." This distinction between "hearing" and "oral hearing" is not founded on *any* authorities nor on the definition of the word "hearing" which implies the presence of the party in open court to present the matter to the judge and there can be no hearing without an opportunity to be heard. The term "hearing" presupposes proceedings "upon notice" (*In re Securities and Exchange Commission*, 84 Fed. (2d) 316, 318). A "hearing" is "an equity term" and is properly applied "to the argument" (*Mil-*

ler v. *Tobin*, 118 Fed. 609, 616). It includes "the testimony and the argument" (*West Chicago Park Commissioners* v. *Riddle*, 151 Ill. 487). The term "hearing" includes "argument" (*Harrison* v. *Commissioner of Internal Revenue*, 107 F. (2d) 341, 342). There, the court said (p. 342):

> "The general rule is that a hearing contemplates a reasonable opportunity to be heard in the presentation of evidence and argument."

The word "hearing" includes *"oral argument"* (*Wisconsin Tel. Co.* v. *Public Service Commission*, 232 Wis. 274, 294). It "presupposes" a formal proceeding "upon notice" and an opportunity "to be heard" (*In re Securities and Exchange Commission, supra*, 84 F. (2d) 316, 318).

Rule 78 on which counsel rely (p. 24) applies to "motions" and not to "hearing."

We have already commented on the contention that ample opportunity was given for the filing of briefs, and have shown that petitioners *did not waive the demand to be heard but insisted upon a hearing in court.* Counsel again repeat their statement that the order of June 1, 1942, changed the previous order of the Master to the effect that a hearing would be had on the objections on June 13, 1942, but that the hearing would be "postponed" and that it stated "that the Clerk would give notice later." They further concede that "No such notice was ever given." In the face of these admissions, the argument that petitioners had every opportunity to make every argument that they desired, is unwarranted. The subject matter of the "proffer of evidence" was already discussed above (pp. 5-6) and need not be repeated.

Respondent was unable to find a single case or precedent for the procedure, and for the propriety of notifying the attorneys that due notice would be given for a hearing and to thereafter dispose of the matter without notice and without a hearing.

For these reasons the Writ of Certiorari should be issued.

Respectfully submitted,

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